

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRIAN ZAHN,

Plaintiff,

v.

BRIAN APPLEBURY, et al.,

Defendants.

No. CV-05-371-FVS

ORDER

THIS MATTER comes before the Court based upon Mr. Zahn's motion for summary judgment and the defendants' motion to dismiss. Mr. Zahn is representing himself. The defendants are represented by Assistant United States Attorney Frank W. Wilson.

BACKGROUND

Brian Zahn alleges he was wrongfully discharged from employment by the U.S. Army Corps of Engineers on January 8, 2001. He seeks relief under Section 1 of the Civil Rights Act of 1871, Rev.Stat. § 1979, now codified as 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, and the State of Washington's Law Against Discrimination ("WLAD"), RCW 49.60. Mr. Zahn lodged his complaint with the District Court Executive on November 30, 2005. The statute of limitations for a § 1983 claim brought in Washington is three years. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir.2002). Although the law is less clear, the

1 statute of limitations for an ADA claim brought in Washington also
2 appears to be three years. *See Pickern v. Holiday Quality Foods,*
3 *Inc.*, 293 F.3d 1133, 1137 n.2 9th Cir.), *cert. denied*, 537 U.S. 1030,
4 123 S.Ct. 559, 154 L.Ed.2d 445 (2002). The statute of limitations for
5 a non-willful violation of the FMLA is two years. 29 U.S.C. §
6 2617(c)(1). The statute of limitations for a willful violation is
7 three years. 29 U.S.C. § 2617(c)(2). Finally, the statute of
8 limitations for a WLAD claim is three years. *Antonius v. King County*,
9 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004).

10 **RULING**

11 Mr. Zahn's claims are untimely and must be dismissed unless there
12 is some basis for tolling the respective statutes of limitation.
13 Insofar as the FMLA is concerned, it is unclear whether the doctrine
14 of equitable tolling is available under any circumstances. Certainly,
15 Mr. Zahn has cited no case suggesting that it is available. Insofar
16 as § 1983 and the ADA are concerned, the doctrine is available to the
17 extent provided by state law. *See Lucchesi v. Bar-O Boys Ranch*, 353
18 F.3d 691, 694 (9th Cir.2003). As a result, it is appropriate to turn
19 to the law of the State of Washington.

20 In *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 811,
21 818 P.2d 1362 (1991), the Supreme Court of the State of Washington
22 recognized that "there may be cases in which the filing deadline for a
23 discrimination action may be equitably tolled." Ms. Douchette's case
24 was not one of them, said the Washington Supreme Court, because the
25 Bethel School District did not act in bad faith, deceive her, or make
26 any false assurances to her and she did not exercise reasonable

1 diligence in pursuing her legal remedies. *Id.* at 812. The Washington
2 Supreme Court revisited the issue of equitable tolling in *Gunnier v.*
3 *Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 953 P.2d 1162 (1998). Again,
4 the state Supreme Court emphasized the need for diligence on the part
5 of the plaintiff. *See id.* at 864-65. He may not obtain relief under
6 the doctrine of equitable tolling unless he demonstrates that he could
7 not, by the exercise of reasonable diligence, "have discovered
8 essential information bearing on the claim." *Id.* at 865.

9 In order to determine whether Mr. Zahn is eligible for equitable
10 tolling, one must examine his claims. They are set forth in his
11 "Statement of Facts."¹ In essence, he alleges that the defendants
12 fired him because he engaged in protected activity and because he was
13 disabled. Furthermore, he alleges that the procedure that led to his
14 termination deprived him of due process of law. Mr. Zahn was fired on
15 January 8, 2001. Neither his Statement of Facts nor any other paper
16 he has filed sets forth facts alleging that the defendants deceived
17 him concerning the deadline(s) for commencing an action or that they
18 made any false assurances concerning the adequacy of the steps he was
19 taking to vindicate his rights. The only wrongful conduct he alleges
20 is that the defendants withheld information indicating that their
21 stated reasons for firing him were not their actual reasons. But
22 there is no reason to think that this is what the Washington Supreme
23 Court means by bad faith, deception, or false assurances. Rarely will
24 a discharged employee have evidence of pretext before he files his
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26 ¹Mr. Zahn may intend this paper to serve as his complaint.
He filed it on July 28, 2006. It is court record number 41.

1 action. Typically, such evidence is obtained, if at all, during
2 discovery. Mr. Zahn has cited no case indicating that an employer's
3 failure to disclose evidence of pretext tolls the statute of
4 limitations. Besides, even assuming that this is the law in the State
5 of Washington, Mr. Zahn faces a second obstacle to relief under the
6 doctrine of equitable tolling: His lack of diligence. Mr. Zahn could
7 have obtained legal advice or conducted legal research with respect to
8 whether he engaged in protected activities prior to his termination.
9 He could have obtained legal advice or conducted legal research with
10 respect to whether the procedure that led to his termination deprived
11 him of due process of law. These things could have been accomplished
12 well before the respective statutes of limitations expired. Once
13 these things were accomplished, Mr. Zahn would have been in a position
14 to make an informed decision with respect to whether to file an
15 employment discrimination action. Nothing more would have been needed
16 at that point. Mr. Zahn's apparent failure to seek legal advice or
17 perform legal research reflects a lack of diligence on his part.
18 Absent diligence, he is ineligible for the equitable tolling of any of
19 the relevant statutes of limitations. See *Douchette*, 117 Wn.2d at
20 812-13.

21 **IT IS HEREBY ORDERED:**

22 1. Mr. Zahn's motion for summary judgment (**Ct. Rec. 34**) is
23 denied.

24 2. The defendants' motion to dismiss (**Ct. Rec. 44**) is granted in
25 part:

26 (a) Mr. Zahn's claim for relief under Section 1 of the Civil

1 Rights Act of 1871, Rev.Stat. § 1979, now codified as 42 U.S.C. §
2 1983, is dismissed with prejudice because it is untimely.

3 (b) Mr. Zahn's claim for relief under the Americans with
4 Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et. seq.*, is dismissed
5 with prejudice because it is untimely.

6 (c) Mr. Zahn's claim for relief under the Family Medical Leave
7 Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, is dismissed with prejudice
8 because it is untimely.

9 (d) Mr. Zahn's claim for relief under the State of Washington's
10 Law Against Discrimination ("WLAD"), RCW 49.60., is dismissed with
11 prejudice because it is untimely.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to Mr. Zahn and to
14 counsel for the defendant.

15 **DATED** this 7th day of February, 2007.

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17 s/Fred Van Sickle
Fred Van Sickle
United States District Judge
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